

Defendant.

Hon. James F. Holderman

MOTION TO DISMISS UNDER RULE 12(B)(1) & 12(B)(6)

3. Exhibit A to the Complaint is an example of the type of dialog box that appears during the process of installing the comScore software. As reflected in Exhibit A, comScore's software is designed so that comScore's TOS is presented directly within the dialog box shown during the installation process; a prospective Panelist need not click on any link or access any

other web page or consult any outside source to review comScore's TOS.¹

4. Exhibit A shows four separate options presented directly underneath the TOS. The four options presented are: (1) "I Agree"; (2) "I Disagree"; (3) "Previous"; and (4) "Quit". There is also a "Next" button but it is not activated as depicted in Exhibit A, meaning it cannot be clicked on. Of these options, only the "I Agree" option will activate the "Next" button, also shown in Exhibit A, and allow the user to continue with the installation process of comScore's software. The comScore software is designed so that if a prospective Panelist does not follow this sequence of clicking (first the "I Agree" button and then the "Next" button), comScore's software will not install. Clicking the "I Disagree" button will also activate the "Next" button, but comScore's software will not be installed.

5. Exhibit A only shows one out of a series of user interfaces that appear during the process of installing and uninstalling comScore's software, which are not attached to the Complaint. It is necessary to review these other user interfaces to put Exhibit A into context as part of a multi-step process for installing and uninstalling the software.

6. For purposes of demonstrating the overall process of which Exhibit A is a part, I personally installed and uninstalled bundled comScore software on my own computer on November 4, 2011. The process I used is substantially similar to the process applicable to all bundled comScore software, including the types of software that Plaintiffs allege they downloaded. To initiate the process, I clicked my way through various screens related to the installation of a third-party software application containing the comScore software until I was presented with a dialog box substantially similar to Exhibit A, containing the comScore TOS. Underneath the terms are buttons for "Accept," "Decline," "Back," "Next," and "Cancel." The "Next" button is also visible but is not activated meaning it cannot be clicked on (as in Exhibit

¹ In this way, the manner by which comScore's TOS is presented to prospective Panelists differs from the manner in which comScore's User License Agreement and Privacy Policy (collectively "ULA") is presented. Whereas the TOS is always presented directly to prospective Panelists during the installation process, comScore's installation process is designed such that the ULA is accessible by hyperlink, which takes the prospective Panelist to a website that contains the ULA in its entirety.

A).

7. Upon being presented with this dialog box, I clicked “Accept.” This causes the dialog box to update such that the “Next” button is now activated (and can now be clicked on) and further shows that I had selected the “Accept” option (the circle next to the word “Accept” is now filled in). I printed a screen shot of this updated dialog box, and have attached a true and copy of what I printed to my Declaration as Exhibit “1”.

8. I also clicked the “Cancel” option for purposes of illustration. This caused a new dialog box to appear which states: “Exit Setup. Setup is not complete. If you exit now, the program will not be installed. You may run Setup again at another time to complete the installation. Exit Setup?” Directly underneath this language are two buttons: “Yes” (to terminate the installation process) and “No” (to continue with the installation process and return to the previous screen). Thus, this new dialog box presents prospective Panelists with the option to terminate the installation process. I printed a screen shot of this new dialog box, and have attached a true and copy of what I printed to my Declaration as Exhibit “2”.

9. I elected to continue with the installation process by clicking “No,” which took me back to the dialog box attached as Exhibit 1, and I proceeded to install the bundled comScore software by clicking “Next.”

10. After the software installation process completed, I then uninstalled the software, which took me less than two minutes to do. To uninstall the software, I navigated to the Start Menu in Windows and clicked on the icon for the Windows “Control Panel” utility. I printed a screen shot showing how I accessed the “Control Panel” utility from the Window’s Start Menu with a single click of the mouse, and have attached a true and correct copy of the screen shot I printed to my Declaration as Exhibit “3”.²

² Incidentally, Exhibit 3 also depicts an icon in the system tray (for Windows users, the system tray appears on the bottom right) corresponding to comScore’s Relevant Knowledge software. I drew a circle around the comScore icon appearing in Exhibit 3 to highlight it for the Court. An icon of this type appears in Panelists’ system trays any time Relevant Knowledge, or any other comScore software, is running. The icon will continue to appear in the system tray for as long as comScore’s software remains running to conspicuously disclose to Panelists the presence of the software. This has been true since February, 2008.

11. Clicking on the “Control Panel” icon depicted in Exhibit 3 opened a new dialog box containing several other icons, including one entitled “Programs,” with subtext that states “Uninstall a program” and “Get programs.” I printed a screen shot of the dialog box that opened, and drew a circle around the “Programs” icon appearing within it. I have attached a true and correct copy of the screen shot I printed to my Declaration as Exhibit “4”.

12. Clicking on the “Programs” icon depicted in Exhibit 4 opened another dialog box containing a number of different icons, each corresponding to a different program installed on my Windows computer. The name of each program appears next to the icon corresponding to that program. Among the icons/names depicted is an icon/name corresponding to comScore’s Relevant Knowledge software. I printed a screen shot of this dialog box, and drew a circle around the Relevant Knowledge icon/name appearing within it to highlight it for the Court. I have attached a true and correct copy of the screen shot I printed to my Declaration as Exhibit “5”.

13. At this point, I was able to uninstall the comScore software simply by highlighting the Relevant Knowledge icon/name and clicking the “Uninstall/Change” button appearing in Exhibit 5. Thus, uninstalling comScore’s software took a total of five clicks of the mouse (including one double-click), from start to finish. All versions of comScore’s software are designed such that the software can be permanently removed in this manner. Thus, uninstalling comScore’s software involves the same process one would use to uninstall most other pieces of mainstream software. Moreover, once inside the Windows “Add or Remove Programs” Utility, comScore’s software is clearly identified by name, as shown in Exhibit 5.³

14. All versions of comScore’s software are designed to operate substantially in the manner as depicted in Exhibit A to the Complaint and Exhibits 1-5 to my Declaration. Thus, all versions of comScore’s software are designed such that:

³ I am informed and believe that most Windows-based software can be removed using the Windows “Add or Remove Programs” utility, rather than utilizing a separate “user interface” within the software itself. In my experience, it is much easier (and less confusing) to go to one centralized location to add or remove software, than to have to learn myriad techniques for doing so, each particular to a separate program installed on your computer.

(a) comScore's TOS window is displayed directly to a prospective Panelist during the installation process without the need to access any other web page;

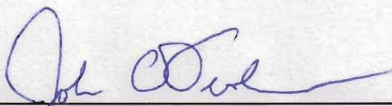
(b) A prospective Panelist *must* click the "I Agree" button (which may also be labeled "Accept" depending on the particular version of the software presented) with their mouse to indicate that they have read and agreed to the comScore TOS set forth in the dialog box directly above the "I Agree" (or "Accept") button, or comScore's software will not install;

(c) comScore's software, like most other pieces of mainstream software, can be permanently removed through the Windows "Add or Remove Programs" utility, with a few clicks of the mouse as described above; and

(d) The presence of comScore's software, once installed on a computer, is conspicuously shown to Panelists anytime it is running on their machines via the presence of an icon in the Panelists' system tray (as shown in Exhibit 3 and explained in footnote 2).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 4, 2011, at Reston, Virginia.

By: 
John O'Toole
Vice President for Panel Operations

Certificate of Service

I hereby certify that on November 4, 2011, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notifications of such filings to the following:

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